

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRY WAYNE WILLIAMS,

Defendant-Appellant.

UNPUBLISHED

July 26, 2011

No. 297588

Wayne Circuit Court

LC No. 07-007351-FC

Before: M. J. KELLY, P.J., and O'CONNELL and SERVITTO, JJ.

PER CURIAM.

In this appeal after resentencing, defendant Terry Wayne Williams appeals as of right the trial court's decision to sentence him, as a third habitual offender, see MCL 769.11, to serve 195 to 480 months in prison for first-degree home invasion, MCL 750.110a(2), to serve 60 to 120 months in prison for possessing a firearm while ineligible to do so (felon in possession), MCL 750.224f, to serve 50 to 98 months in prison for committing an assault with a dangerous weapon (felonious assault), MCL 750.82, to serve 60 months in prison for possessing a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and to serve 50 to 98 months in prison for killing an animal, MCL 750.50b. We conclude that there were no errors warranting resentencing. However, we agree that the trial court misstated the maximum sentences for Williams' convictions for felonious assault and killing an animal; the maximum sentences for those offenses are eight years in prison, which equals 96 months rather than 98 months. For that reason, we remand this matter to the trial court for the ministerial task of correcting the maximum sentences for these offenses. In all other respects, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

The evidence in this case showed that, in March 2007, Williams entered a home in Detroit without permission while armed with a shotgun. While in the home, he pointed the shotgun at a woman and threatened that the situation would get "ugly" if she did not reveal the whereabouts of her brother. After the woman fled to the basement, Williams took a cell phone belonging to the woman's niece, went outside, and walked to the rear of the home where he shot and killed the woman's dog. He then left.

Police officers shortly thereafter arrested Williams at his girlfriend's residence where they also found the missing cell phone and the shotgun identified as the one used in the home invasion. Two witnesses identified Williams as the man who entered the home with the shotgun. The jury convicted Williams of having committed the five offenses noted above.

The trial court sentenced Williams in August 2007. As calculated by the trial court, the recommended minimum sentence range for Williams' home invasion conviction was from 87 to 217 months in prison. The trial court sentenced him to serve 10 to 40 years in prison for home invasion, five to ten years in prison for being a felon in possession, to serve four to eight years in prison for felonious assault, to serve five years in prison for felony-firearm, and to serve two to four years in prison for killing an animal. Williams then appealed his convictions and sentences to this Court.

On appeal, this Court concluded that there were no errors that warranted a new trial and, for that reason, affirmed Williams' convictions. See *People v Williams*, unpublished opinion per curiam of the Court of Appeals, issued March 5, 2009 (Docket No. 280428). However, the Court noted that the prosecution conceded that the record did not support the trial court's decision to score offense variable 13 of the sentencing guidelines. For that reason, the Court vacated Williams' sentences and remanded the matter to the trial court for resentencing. On remand, the case was assigned to a new judge for resentencing. *Id.* The new judge recalculated the sentencing guidelines with offense variable 13 scored at zero points, which resulted in a minimum sentence range of 78 to 195 months in prison. The trial court then sentenced Williams as noted above.

Williams now appeals again as of right.

II. TRIAL ERRORS

As a preliminary matter, we note that, in his standard 4 brief, Williams has raised several claims of error relating to the conduct of his original trial and certain pretrial procedures. Our Supreme Court has held that a defendant has an appeal as of right from the proceedings that occur on remand from appeal as of right. See *People v Jones*, 394 Mich 434, 435-436; 231 NW2d 649 (1975). This is so because the proceedings ordered after an appeal as of right are in effect a continuation of the defendant's original appeal as of right. See *People v Kincade*, 206 Mich App 477, 482; 522 NW2d 880 (1994) (characterizing the proceedings on remand as a continuation of the defendant's appeal as of right); see also MCR 7.202(6)(b)(iv) (defining final judgment to include a "sentence imposed, or order entered, by the trial court following a remand from an appellate court in a prior appeal of right."); MCR 7.203(A)(1). However, the appeal after remand is limited by the scope of the remand ordered by the appellate court; and, as such, the defendant may not assert claims of error that relate to prior proceedings. *Jones*, 394 Mich at 435-436, citing *People v Pickett*, 391 Mich 305; 215 NW2d 695 (1974). Williams already had an appeal as of right for his claims of error relating to his trial and convictions. And the present appeal is limited to claims of error relating to his resentencing alone. *Id.* Therefore, we decline to address those claims of error that do not relate to his resentencing.

III. SENTENCING ERRORS

A. STANDARDS OF REVIEW

On appeal, Williams raises several claims of error with regard to his sentencing. This Court reviews de novo claims concerning a defendant's constitutional rights. *People v Drohan*, 475 Mich 140, 146; 715 NW2d 778 (2006). Likewise, this Court reviews de novo whether the trial court properly interpreted and applied the sentencing guidelines. *People v Bemmer*, 286 Mich App 26, 31; 777 NW2d 464 (2009). A trial court does not have discretion to choose how to score offense variables (OV) or prior record variables (PRV); it must score them as provided under the sentencing guidelines. *Id.* at 32, 36-37. This court reviews a trial court's factual findings at sentencing for clear error. *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008).

B. PROPORTIONALITY AND CRUEL AND UNUSUAL PUNISHMENT

Williams first argues that the trial court's decision to sentence him to a minimum sentence for his home invasion conviction that was substantially higher than what he previously received is unlawful. Specifically, he argues that the revised minimum sentence was not proportionate to the crime and constitutes cruel and unusual punishment. He also argues that the trial court erred in the same way when it sentenced him to higher minimum sentences for his convictions of felonious assault and killing an animal.

A criminal defendant has the right to a sentence that is proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Babcock*, 469 Mich 247, 254; 666 NW2d 231 (2003). And a grossly disproportionate sentence can constitute cruel and unusual punishment. See *People v Bullock*, 440 Mich 15, 32; 485 NW2d 866 (1992). However, as our Supreme Court has noted, "the appropriate sentence range is determined by reference to the principle of proportionality; it is a function of the seriousness of the crime and of the defendant's criminal history." *Babcock*, 469 Mich at 264. As such, a minimum sentence that is within the correctly determined guidelines range is presumptively proportionate. *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008).

At Williams' resentencing, the new judge assigned to his case decided to sentence Williams to serve a minimum of 195 months in prison, which was the highest possible minimum term under the corrected range for the sentencing guidelines. This minimum sentence was more than six years longer than the minimum term assigned by the previous judge. The new judge also sentenced Williams to serve a minimum sentence for his felonious assault conviction that was one year longer and to serve a minimum sentence for killing an animal that was three years longer. Nevertheless, each of these sentences was within the range applicable under the corrected sentencing guidelines. As such, the minimum sentences were presumptively proportionate. *Powell*, 278 Mich App at 323. Further, a trial court is only required to state with specificity the reason for a particular minimum sentence when the sentence constitutes a departure from the sentencing guidelines. See *Babcock*, 469 Mich at 258, citing MCL 769.34(3); see also *People v Conley*, 270 Mich App 301, 313; 715 NW2d 377 (2006) (stating that a trial court has met the normal articulation requirement when it expressly or implicitly relies on the sentencing guidelines). Although Williams plainly feels aggrieved by the new judge's decision

to sentence him to a higher minimum sentence than the previous judge did, the new judge had the authority to do just that after this Court vacated Williams' original sentences and remanded for resentencing. And, because the new sentence was imposed by a new judge, there is no presumption that the decision was motivated by vindictiveness. See *People v Mazzie*, 429 Mich 29, 33-34; 413 NW2d 1 (1987) (noting that a new judge might properly view the information concerning the offender and offense differently than the prior sentencing judge).

Williams has not overcome the presumption that his minimum sentences were proportionate. Therefore, we must affirm his sentences. MCL 769.34(10). Further, because a proportionate sentence is necessarily not cruel and unusual, Williams has failed to establish that his sentences were unconstitutional. *Powell*, 278 Mich App at 323.

Nevertheless, Williams has correctly noted that his maximum sentences for felonious assault and killing an animal exceeded the maximum penalty permitted by law. See MCL 769.11(1)(a) (providing that a trial court may sentence a defendant who is a third habitual offender to serve a maximum term that is twice the maximum provided by statute for a first conviction); MCL 750.50b(3)(a) (providing a maximum sentence of four years for killing an animal); MCL 750.82(1) (providing a maximum sentence of four years for felonious assault). He did not, however, ask that these maximums be corrected. Notwithstanding that, the prosecution has conceded this apparent clerical error, and we conclude that it should be corrected. Therefore, we remand this case for the ministerial task of correcting the maximum sentences for Williams' convictions for felonious assault and killing an animal to reflect a maximum of 96 months. See MCR 7.216(A)(7).

C. INEFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING

Williams also argues that he did not receive the effective assistance of counsel at his resentencing. Specifically, Williams argues that his lawyer was ineffective for failing to ask the trial court to state a reason for ordering the higher minimum sentences and for failing to advocate for lower minimum sentences. In order to demonstrate that his counsel was ineffective, Williams must show that his counsel's acts or omissions fell below an objective standard of reasonableness under prevailing professional norms and that, but for the error, the outcome of the proceedings would have been different. *People v Uphaus (On Remand)*, 278 Mich App 174, 185; 748 NW2d 899 (2008).

On appeal, Williams asserts that he had a "reasonable expectation" that his sentences would be "less severe" given that this Court had vacated his prior sentences and because the original sentences were premised on an incorrectly calculated guideline's range. And yet when the court imposed a more severe minimum sentence, he maintains, his "stand in" counsel, who "was apparently unfamiliar" with the case, did not object. Williams has not identified any factor with regard to his background or the nature of the offense that his trial counsel might have used to advocate for a lower minimum sentence that was not already in the record before the trial court. He likewise does not identify any aspect of his case with which his "stand in" counsel was unfamiliar. Finally, we note that Williams wished to speak on his own behalf and did so. And he has not stated how additional advocacy by his counsel might have been more effective than his own statements. Accordingly, Williams has not established that his counsel's failure to

advocate for a more lenient minimum sentence fell below an objective standard of reasonableness under the circumstances present at his sentencing. *Id.*

In addition, the sentencing court had to impose a sentence within the guidelines range, see MCL 769.34(2), and Williams has failed to identify any basis for objecting to the imposition of a sentence within that range. Williams' trial counsel cannot be faulted for not making a meritless objection. *People v Unger*, 278 Mich App 210, 256; 749 NW2d 272 (2008). Further, there is no indication on this record that the trial court was unaware of the previous court's sentences or that the court would have imposed a less severe minimum sentence had Williams' counsel noted the lengths of the prior sentences and asked the court to state its reasons for imposing the specific minimum sentences that it did. Therefore, Williams has failed to establish that his sentencing counsel committed errors or that those errors affected the trial court's decisions with regard to his minimum sentences. *Uphaus*, 278 Mich App at 185.

Finally, although Williams' trial counsel should have objected to the sentencing court's erroneous identification of the maximum possible sentences for his convictions of felonious assault and killing an animal, we have already determined that Williams is entitled to relief as to those errors. Therefore, Williams is entitled to no further relief.

D. SCORING ERRORS

In his standard 4 brief, Williams also argues that the trial court erred when it scored PRV 6 and 7, and when it scored OV 9.

With regard to PRV 6, Williams argues that the trial court could not score this variable at five points because he was not on probation, awaiting a delayed sentence, or on bond. However, the pre-sentence investigation report (PSIR) prepared for Williams' sentencing shows that he had been charged with operating a motor vehicle while intoxicated and for having an open intoxicant just a couple months before he committed the offenses at issue. Further, for the offenses at issue, the report lists his "Status at the Time of Offense" as "On Bond." The trial court could properly rely on this information in scoring PRV 6 at five points. *People v Callon*, 256 Mich App 312, 334; 662 NW2d 501 (2003) ("A presentence report is presumed to be accurate and may be relied on by the trial court unless effectively challenged by the defendant.").

Williams also contends that the trial court erred when it scored PRV 7, which addresses subsequent and concurrent felony convictions, because it could not score that variable using his home invasion conviction. Specifically, he notes that MCL 777.57(2)(c) prohibits a trial court from scoring this variable using "a concurrent felony conviction if a mandatory consecutive sentence . . . will result from that conviction." Because the trial court exercised its discretion to have Williams' home invasion conviction run consecutive to the other offenses, Williams argues, it could not score PRV 7 using the home invasion. We cannot agree that the trial court's exercise of discretion caused it to be unable to consider the home invasion conviction in scoring PRV 7. MCL 777.57(2)(c) only limits the trial court's ability to consider convictions that provide for *mandatory* consecutive sentencing. As Williams recognized in his brief on appeal, the home invasion statute does not require consecutive sentencing; it merely permits it. Therefore, the trial court did not err in considering the home invasion conviction when scoring PRV 7.

Williams also argues that the trial court erred in scoring OV 9 because only one victim was placed in danger of injury or loss of life. In order to properly score OV 9, the trial court had to determine how many victims were placed in danger of physical injury or loss of life as a result of Williams' actions during the commission of his offenses. MCL 777.39(2)(a). At trial, there was evidence that Williams barged into the residence at issue with a shotgun and pointed it at a woman who was sitting in the living room. In addition, the woman's nephew testified that he was sitting in the living room as Williams approached the home and that he moved to the dining room before Williams entered. Although Williams did not point his shotgun directly at the woman's nephew, due to his proximity in the dining room, the nephew was clearly in danger of being injured or killed if Williams began to fire the shotgun or if the shotgun misfired. In addition, there was evidence that there were other persons in the basement of the home who could conceivably have been injured when Williams fired the shot that killed the family's dog. Therefore, we cannot conclude that the sentencing court clearly erred when it found that there were two to nine persons placed in danger by Williams' acts. *Osantowski*, 481 Mich at 111. Once the trial court found that there were from two to nine persons placed in danger of injury or loss of life, it had to score OV 9 at 10 points. MCL 777.39(1) (requiring the trial court to score OV 9 using the highest number of points attributable after making the appropriate findings); *Bemer*, 286 Mich App at 32.

There were no scoring errors.

E. OTHER SENTENCING ERRORS

Williams also argues that the trial court erred when it sentenced him as a third habitual offender and that his PSIR is inaccurate and must be corrected.

With regard to the inaccuracies, we note that the author of the PSIR indicated that she spoke with the assistant prosecuting attorney who handled the prior appeal and summarized and received the "appellate brief" dealing with the third habitual offender issue. The author referred to section III of that brief, which section dealt with whether the original sentencing court properly sentenced Williams as a third habitual offender. This Court's original opinion addressed whether the sentencing court properly sentenced Williams as a habitual offender under section III. Further, the fact that the author of the report concluded from this section that the ruling with regard to Williams' status as a habitual offender remained "in effect", leads us to conclude that the author mistakenly referred to this Court's prior opinion as an appellate brief. In any event, even if the author was referring to the prosecutor's brief, the author's opinion about whether Williams can properly be sentenced as a third habitual offender does not alter the applicable law. As noted below, the trial court properly sentenced Williams as a third habitual offender and there is otherwise no evidence that the author's characterization of the "appellate brief" will adversely affect Williams. Therefore, this claim of error does not warrant relief. See, e.g., *Uphaus*, 278 Mich App at 182.

Finally, in the previous opinion, this Court addressed Williams' claim that he could not be sentenced as a third habitual offender. This Court determined that Williams failed to establish a plain error that affected his substantial rights because he was in fact a third habitual offender. This determination is binding on this Court and we will not revisit it. See *People v Herrerra (On Remand)*, 204 Mich App 333, 340; 514 NW2d 543 (1994) (noting that the law of the case

doctrine “provides that an appellate court’s decision regarding a particular issue is binding on courts of equal or subordinate jurisdiction during subsequent proceedings in the same case.”). To the extent that Williams disagrees with this Court’s prior handling of that claim of error, his remedy is to bring this claim of error to our Supreme Court.

There were no errors warranting resentencing.

Affirmed, but remanded for the ministerial task of correcting the sentences for felonious assault and killing an animal to reflect a maximum sentence of 96 months. We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ Peter D. O'Connell
/s/ Deborah A. Servitto